SHELL CO. OF THE FEDERATION OF MALAYA LTD. v. CHAIRMAN, MUNICIPAL COUNCIL (No. 2)

[C.A. (Thomson C.J., Hill J.A., Good J.A.)
April 17, 1961]

[K.L. — F.M. Civil Appeal No. 67 of 1960]

Practice and Procedure — Leave to appeal to Privy Council — Test to be applied — Whether decision of Court of Appeal final or interlocutory — Appeals from the Supreme Court Ordinance, 1958, s.3(a) and (b).

In an application for conditional leave to appeal to the Privy Council against a decision of the Court of Appeal, the test to be applied is: Does the judgment or order, as made, finally dispose of the rights of the parties?

Held: (1) since the decision which is in question here is not a final decision, the case does not fall within paragraph (a) of section 3 of the Appeals from the Supreme Court Ordinance, 1958;

(2) there is nothing here like the interpretation of an important Act of Parliament or of some fundamental principle of the law, but only the interpretation of a rule of Court which if it is found unsuitable can be changed. That is therefore, not a particularly fit subject for appeal.

Cases referred to:—

(1) *Salaman* v. *Warner & Ors.* [1891] 1 Q.B. 734.

(2) *Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547.

APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL.

R. Ramani for applicant/respondent.

A. L. Hills for respondent/appellant.

Thomson C.J. (delivering oral judgment of the Court): This is an application for conditional leave to appeal to the Privy Council against the decision of this Court in the matter of the Shell Company of Malaya against the Chairman of the Kuala Lumpur Municipal Council which was delivered on 14th November, 1960.

It will be desirable to recite the course which the proceedings took before they came to us.

The Municipal Council in pursuance of its statutory powers had made some sort of rating decision unfavourable to the Shell Company to which the Shell Company took exception. The Company thereupon exercised its statutory right of appeal. The appeal in such cases is required to be commenced by way of notice of motion. The Company filed a notice of motion which was not accompanied by an affidavit. Some time later a supporting affidavit was filed. In due course the Company's appeal came before Mr. Justice Hashim and on its coming on the Municipality raised an objection, of which they had given the Shell Company notice, and asked that the appeal should be struck out on the ground that the notice of motion by which it had been commenced had not been accompanied by an affidavit.

In the event Mr. Justice Hashim accepted the Municipality's contention and struck out the Shell Company's motion. That is, in effect, he dismissed their appeal.

Against that decision the Shell Company appealed and on 8th March we allowed the appeal * and set aside the order of Mr. Justice Hashim and it is against our decision that the Municipality now seeks leave to appeal.

The immediate consequence of our decision was that the appeal would in due course come on for hearing on its merits.

But what was really involved in the case was not a question of procedure but the question of the rating liability of the Shell Company. It was to raise that question that the Shell Company came to the Court. The first step they took was by way of notice of motion because that is the type of step prescribed by law for starting such proceedings. They came to the Court to have their rating liability determined in accordance with law and it has not been determined.

On that view of the proceedings we are of the opinion that on the authorities our decision cannot be regarded as a final judgment.

In *Salaman* v. *Warner & Ors.*[1] Lord Esher said:

> "If their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on then I think it is not final, but interlocutory."

Lord Alverstone said in the case of *Bozson* v. *Altrincham Urban District Council:*[2]

> "The real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties?"

I would emphasise the words "finally dispose of the rights of the parties".

Whichever test be applied in our view our decision which is in question here is not a final decision. Therefore the case does not fall within paragraph (a) of section 3 of the 1958 Ordinance.

It has, however, been argued that if that be so it falls within paragraph (b) of that subsection because "the case is from its nature a fit one for appeal."

Again we do not agree.

There is nothing here like the interpretation of an important Act of Parliament or of some fundamental principle of the law but only the interpretation of a rule of Court which was made yesterday and which if it is found unsuitable can be changed to-morrow. We see no reason for saying that that is a particularly fit subject for appeal.

We are told we have set a precedent which will be followed. Well, every judgment we give is a precedent that will be followed until it is reversed and simply to say that a judgment

* Reported [1961] M.L.J. 141.

creates a precedent does not *ipso facto* say that it is a judgment fit for appeal. On that hypothesis every judgment is a judgment fit for appeal.

The Municipality will have just to wait. If they win in the long run they will have nothing to complain of. If they lose in the long run they can raise everything involved elsewhere.

In the meantime the application is dismissed with costs.

Application dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell & Ramani.*

Re SYED AHMED HOOD ALSAGOFF DECD.,

[C.A. (Rose C.J., Tan Ah Tah and Chua JJ.)
April 12, 1961]

[Singapore — Civil Appeal No. 27 of 1960]

Trusts and Trustees — Defaulting trustee — Order for payment into Court — Non-compliance — Writ of attachment — Principles on which writ issued — Debtors Ordinance (Cap. 13), s.10.

Costs — Relevant authorities not cited — Order as to costs.

The respondents obtained an order of Court that the appellant should pay $92,240.23 into Court, which order was not complied with. The respondents then applied by motion to the Court for liberty to issue a writ of attachment against the appellant.

Held: (1) having regard to the consideration that sending a person to prison for such a cause is a serious matter affecting the liberty of the subject, great care should be taken by the Court to be satisfied that the money in question has been in the actual possession or control of the person against whom it is sought to issue a writ of attachment, and that mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough;

(2) if the monies were under the actual control of the defendant or may have been received on his behalf by an agent who had not accounted, then leave to issue a writ of attachment should not be granted;

(3) in the present case there is an element of doubt which must be resolved in favour of the appellant;

(4) as the relevant authorities which have determined the appeal were not cited to the Court, there would be no order as to costs either in the Court of Appeal or in the Court below.

[Editorial Note: It would appear that *Yeoh Kok Keng & Ors.* v. *Yeoh Kok Ann* (1919), 15 S.S.L.R. 159, C.A. was also not cited to the Court. There it was decided that it is necessary, before the Court can exercise its power of imprisonment against a defaulting executor, that there must be an order to pay, default in payment and a judgment debt arising through the default. In other words, a judgment based upon the order to pay is necessary.

Further, the judgment debt necessary to found proceedings against the executor must comprise only sums which are or have been in his possession or under his control. It must not include sums for interest or costs.

The default alleged must be in obeying an order to pay a sum certain. Elementary principles of justice require that a man who is in danger of being sent to prison for non-payment of a sum of money should be definitely informed beforehand what is the exact sum in respect of which he is being charged.]

Cases referred to:—

(1) *Marris* v. *Ingram* (1879) 13 Ch. D. 338.
(2) *In re Fewster* [1910] 1 Ch. 447.
(3) *In re Wilkins* [1901] W.N. 202.
(4) *In re Underwood* (1903) 51 W.R. 335.
(5) *In re Weatherley* (1919) 88 L.J. K.B. 482 at p. 486.
(6) *Petty* v. *Daniel* (1886) 34 Ch. D. 172 at p. 181; 56 L.J. Ch. 192 at p. 195.
(7) *Evans* v. *Noton* (1892) 9 T.L.R. 108 at p. 109.
(8) *In re Wilde* [1910] W.N. 128.

COURT OF APPEAL.

Miss J. G. Smith for the appellant.

Y. R. Jumabhoy for the respondents.

Rose C.J.: This is an appeal from an Order made by the learned trial Judge on a Motion on behalf of the plaintiffs/respondents for liberty to issue a Writ of Attachment against the defendant/appellant.

It is common ground that the respondents obtained an Order that the appellant should pay $92,240.23 into Court and that the Order has not been complied with. It is also not in dispute that the appellant was at all material times acting in a fiduciary capacity.

The question raised on this appeal is whether it was sufficiently proved that the monies in question were in the appellant's possession or under his control, within the meaning of section 10 of the Debtors Ordinance (Cap. 13).

The relevant part of section 10 reads as follows:—

"10. Where the Court is satisfied that there has been default by a trustee or person acting in a fiduciary capacity in payment into Court of any sum in his possession or under his control, the Court may commit such trustee or person to prison for a term which may extend to six months."

The learned trial Judge relied on the case of *Marris* v. *Ingram*(1). Unfortunately, as learned counsel for the appellant concedes, he was not referred to two subsequent and very relevant cases, namely, *In re Fewster; Herdman* v. *Fewster*(2) (which was followed in the same year by *In re Wilkins; Emsley* v. *Wilkins*(3) and *In re Underwood*(4).

The principle enunciated in those cases would seem to be that having regard to the consideration that sending a person to prison for such a cause is a serious matter affecting the liberty of the subject, great care should be taken by the Court to be satisfied that the money in question has been in the actual possession or control of the person against whom it is sought to issue a writ of attachment, and that mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough. Moreover, if the position upon a consideration of the affidavits is consistent with either view, namely, that the monies either were under the actual control of the defendant or may have been received on his behalf by an agent who had not accounted, then leave to issue a writ of attachment should not be granted.